Supreme Court, U.S.
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No. 06-707

IN THE

Supreme Court of the United States

THE ALASKA CONSTITUTIONAL LEGAL DEFENSE CONSERVATION FUND, INC., *et al.*,

Petitioners,

v.

DIRK DEMPTHORNE, Secretary of the Interior, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Federal Subsistence Board Regulations which exclude subsistence hunting and fishing on all federal land in Alaska to all urban residents of Alaska violate the Public Trust Doctrine which requires all public land and resources thereon to be held in common trust for all the citizens of the United States.

2. Can the Federal Subsistence Board establish the priority of subsistence uses of federal land in Alaska by restricting the class of people who can use the federal land in the State of Alaska.

3. Do the regulations of the Federal Subsistence Board which excludes subsistence hunting and fishing on all federal lands in Alaska by urban residents of Alaska violate equal protection of the law.

LIST OF PARTIES

The parties are The Alaska Constitutional Legal Defense Conservation Fund, Inc., Dale Bonduarant, Warren Olson, Daniel a. Devereux; Shannon Farrah, James P. Jacobson, W. Tom Minter, Gary Younkin, Plaintiffs–Appellants, who consist of both Alaska residents and non-Alaska residents who are citizens of the United States.

The Defendants-Appellees are Dirk Kempthorn,[1] Secretary of the Interior, Mike Johanns, Secretary Department of Agriculture, Kathleen Clarke, Director Bureau of Land Management, Dale Bosworth, Chief of U.S. Forest Service, Thomas H. Boyd, Representative of the Federal Subsistence Board, Office of Subsistence Management, U.S. Fish and Wildlife Services, Steve Kessler, Regional Subsistence Program Leader, U.S. Forest Service, Alaska Region, United States of America.

In addition, the Alaska Federation of Natives appeared as *amicus curiae* in support of Defendant-Appellees.

CORPORATE DISCLOSURE STATEMENT

The Alaska Constitutional Legal Defense Conservation Fund, Inc., is a non-profit corporation existing under the laws of the state of Alaska, whose stated purpose is to guarantee the protection of Alaska's natural resources and to preserve them for all the people's common use.

---

1. Dirk Kempthorne has been substituted for his predecessor Gail Norton as the Secretary of the Interior.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was a memorandum filed August 22, 2006. The Ninth Circuit affirmed the judgment of the United States District Court for the District of Alaska, entered on August 19, 2005, after the filing of an order on the cross motions for summary judgment dated August 16, 2005. (*See*, Appendix A and B)

STATEMENT OF JURISDICTION

The court's jurisdiction is invoked under 28 U.S.C. § 1331 for violations of the Alaska National Interest Lands Conservation Act, 16 U.S.C. §§ 1301, *et seq.*

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution:

Section 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

16 U.S.C. § 3114. Preference for subsistence uses.

Except as otherwise provided in this Act and other federal laws, the taking on public lands of fish and wildlife for nonwasteful subsistence uses shall be accorded priority over the taking on such lands of fish and wildlife for other purposes. Whenever it is necessary to restrict the taking of populations of fish and wildlife on such lands for subsistence uses in order to protect the continued viability of such populations, or to continue such uses, such priority shall be implemented through appropriate limitations based on the application of the following criteria:

(1) customary and direct dependence upon the populations as the mainstay of livelihood;

(2) local residency; and

(3) the availability of alternative resources.

16 U.S.C. § 3202. Taking of fish and wildlife.

(a) Responsibility and authority of the State of Alaska. Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands except as may be provided in subchapter II of this chapter, or to amend the Alaska constitution.

(b) Responsibility and authority of Secretary. Exempt as specifically provided otherwise by this Act, nothing in this Act is intended to enlarge or diminish the responsibility and authority of the Secretary over the management of public lands.

36 C.F.R. § 242.5, 50 C.F.R. § 100.5 Eligibility for subsistence use.

(a) You may take fish and wildlife on public lands for subsistence uses only if you are an Alaska resident of a rural area or rural community. The regulations in this part may further limit your qualifications to harvest fish or wildlife resources for subsistence uses. If you are not an Alaska resident or are a resident of a non-rural area or community listed in Sec. 242.23, you may not take fish or wildlife on public lands for subsistence uses under the regulations in this part.

(b) Where the Board has made a customary and traditional use determination regarding subsistence use of a specific fish stock or wildlife population, in accordance with, and as listed in, Sec. 242.24, only those Alaskans who are residents of a rural areas or communities designated by the Board are eligible for subsistence taking of that population or stock on public lands for subsistence uses under the regulations in this part. If you do not live in one of those areas of communities, you may not take fish or

wildlife from that population or stock, on public lands under the regulations in this part.

(c) Where customary and traditional use determinations for a fish stock or wildlife population within a specific area have not yet been made by the Board (*e.g.*, "no determination"), all Alaskans who are residents of rural areas or communities may harvest for subsistence from that stock or population under the regulations in this part.

(d) The National Park Service may regulate further the eligibility of those individuals qualified to engage in subsistence uses on National Park Service lands in accordance with specific authority in ANILCA, and National Park Service regulations at 36 CFR Part 13.

36 C.F.R. § 242.15, 50 C.F.R. § 100.15 Rural determination process.

(a) The Board shall determine if an area or community in Alaska is rural. In determining whether a specific area of Alaska is rural, the Board shall use the following guidelines:

(1) A community or area with a population of 2,500 or less shall be deemed to be rural unless such a community or area possesses significant characteristics of a non-

rural nature, or is considered to be socially and economically a part of an urbanized area.

(2) Communities or areas with populations above 2,500 but not more than 7,000 shall be determined to be rural or non-rural.

(3) A community with a population of more than 7,000 shall be presumed non-rural, unless such community or area possesses significant characteristics of a rural nature.

(4) Population data from the most recent census conducted by the United States Bureau of Census as updated by the Alaska Department of Labor shall be utilized in this process.

(5) Community or area characteristics shall be considered in evaluating a community's rural or non-rural status. The characteristics may include, but are not limited to:

(i) Use of fish and wildlife;

(ii) Development and diversity of the economy;

(iii) Community infrastructure;

(iv) Transportation; and

(v) Educational institutions.

(6) Communities or areas which are economically, socially, and communally integrated shall be considered in the aggregate.

(b) The Board shall periodically review rural determinations. Rural determinations shall be reviewed on a 10-year cycle, commencing with the publication of the year 2000 U.S. census. Rural determinations may be reviewed out-of-cycle in special circumstances. Once the Board makes a determination that a community has changed from rural to non-rural, a waiting period of 5 years shall be required before the non-rural determination becomes effective.

(c) Current determinations are listed as Sec. 242.23.

36 C.F.R. § 242.23, 50 C.F.R. § 100.23 Rural determinations.

(a) The Board has determined all communities and areas to be rural in accordance with Sec. 242.15 except the following:

Adak;

Fairbanks North Star Borough;

Homer area – including Homer, Anchor

Point, Kachemak City, and Fritz Creek;

Juneau area – including Kenai, Soldotna, Sterling, Nikiski, Salamatof, Kalifornsky, Kasilof, and Clam Gulch;

Ketchikan area – including Ketchikan City, Clover Pass, North Tongass Highway, Ketchikan East, Mountain Point, Herring Cove, Saxman East, Pennock Island and parts of Gravina Island;

Municipality of Anchorage;

Seward area – including Seward and Moose Pass, Valdez, and

Wasilla area – including Palmer, Wasilla, Sutton, Big Lake, Houston, and Bodenberg Butte.

You may obtain maps delineating the boundaries of Non-rural areas from the U.S. Fish and Wildlife Service.

STATEMENT OF THE CASE

Dale Bondurant was an Alaskan resident and was the President of Alaska Constitutional Legal Defense Conservation Fund, Inc. (hereinafter referred to as "The Conservation Fund"). He resided in Soldotna, Alaska, and had been a resident of Alaska for the past fifty years. Dale Bondurant had hunted and fished all his life. He died on October 25, 2006.

The Conservation Fund is a non-profit corporation existing under the laws of Alaska. This corporation is made up of individuals who have an interest in outdoor activities, and are fishermen and hunters who believe in the wise use of Alaska's natural resources. The Conservation Fund has over 60 members who come from all over Alaska and out of state. The Conservation Fund is a public interest group. Its purpose is to guarantee the protection of Alaska's natural resources and to preserve them for all the people's common use without special privilege to any one group within the State of Alaska and the nation as a whole. It places particular emphasis on the maintenance of Alaska's fish and wildlife resources and their uses, and continued access to public lands. It is committed to the preservation of critical habitat, assurance of access to and use of public resources, dedication to the education of the public as to renewable resource management, and participation in regulatory, legislative, administrative, and judicial policy decision affecting Alaska's natural resources and their uses.

Warren Olson is an Alaskan resident. He currently resides in Anchorage, Alaska, and has been a resident of Alaska for the past forty-five years. Warren Olson is the Secretary/ Treasurer of the Conservation Fund, and receives the

correspondence and acts as the registered agent for the Conservation Fund at his address in Anchorage, Alaska. He has participated in the harvest of renewable resources from nearly all areas on a personal basis. He can no longer participate in subsistence harvesting of renewable resources in the State of Alaska on federal lands because of his residence.

Dale Bondurant and Warren Olson hold hunting and fishing licenses from the State of Alaska permitting them to hunt and fish on all state lands and waters in Alaska open to hunting and fishing.

James P. Jacobson is an Alaskan resident. He currently resides in Kodiak, Alaska. Mr. Jacobson is a licensed hunting guide in the State of Alaska. Mr. Jacobson arranges guided hunts on lands open to hunting. Due to federal involvement, Mr. Jacobson has had to cancel pre-booked guided hunts as the state issued permits were unilaterally restricted by the federal Subsistence Board. Mr. Jacobson has participated in the harvest of Alaska's natural resources and has been a member of the Fish and Game Advisory Committee. Mr. Jacobson's livelihood has been significantly impacted by the implementation of Title VIII of ANILCA with respect to Game Unit 23 and elsewhere in Alaska.

Daniel W. Devereux is an Alaskan resident. He currently resides in Anchorage, Alaska. Mr. Devereux applied for and was awarded a sheep hunting permit (hunt no. DS3854) by the State of Alaska for Game Unit 23 for the 1998 season. Mr. Devereux's hunting permit was rendered void by the Federal Subsistence Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Mr. Devereux was denied participation in the season which

began August 10, 1998 and went through September 20, 1998 on federal lands, Unit 23.

Shannon Farrah resides in Tucson, Arizona, and has applied for and received an Alaska non-resident hunting license no. 8010260 in 1998. Ms. Farrah applied for and was awarded a sheep-hunting permit (no. 0007, hunt DS384) by the State of Alaska for Game Unit 23 for the 1998 season. Ms. Farrah's hunting permit was rendered void by the Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Ms. Farrah was denied participation in the season, which began August 10, 1998 on federal lands, Unit 23, and went through September 20, 1998, and is forever barred from hunting on federal lands designated for subsistence in Alaska as a non-resident of Alaska.

Tom Minter resides in Oviedo, Florida, and has applied for and received an Alaska non-resident hunting license no. 8010257 in 1998. Mr. Minter applied for and was awarded a sheep-hunting permit (no. 0004, hunt DS384) by the State of Alaska for Game Unite 23 for the 1998 season. Mr. Minter's hunting permit was rendered void by the Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Mr. Minter was denied participation in the season which began August 10, 1998 on federal lands, Unit 23, and went through September 20, 1998. Mr. Minter is now barred from hunting on federal lands in Alaska designated for subsistence as a non-resident of Alaska.

Gary Younkin resides in Hume, Virginia and had applied for and received an Alaska non-resident hunting license no 8010261 in 1998. Mr. Younkin applied for and was awarded a sheep-hunting permit (no. 0002, hunt DS384) by the State of Alaska for Game Unit 23 for the 1998 season.

Mr. Younkin's hunting permit was rendered void by the Regional Advisory Council and therefore the Federal Subsistence Board on August 4, 1998. Mr. Younkin was denied participation in the season which began August 10, 1998 on federal lands, Unit 23 and went through September 20, 1998. Mr. Younkin is now barred from hunting on federal lands designated for subsistence in Alaska as a non-resident of Alaska.

Dale Bondurant, Warren Olson, and James P. Jacobson have all applied to the United States Department of the Interior and other federal authorities in Alaska to hunt and fish on federal public lands and in State of Alaska sovereign waters; in those areas restricted to "subsistence" hunting and fishing by only "rural' residents. James P. Jacobson, a resident of "rural" Alaska, applied for a subsistence sheep permit for GMU 23 in August, 1998.

The United States Department of the Interior denied Dale Bondurant and Warren Olson permits to hunt and fish on federal land and waters because they are classified as "urban residents" of Alaska under ANILCA and its regulations. James P. Jacobson was denied his sheep-hunting permit by David Spirtes, Superintendent of the National Parks Service stating that although he was a resident of "rural" Alaska, he was not a resident of GMU 23.

Plaintiffs Bondurant and Olson appealed the denial of their permits to federal regulatory offices in Alaska under the control of the Department of Interior and the Department of Agriculture, but the denials were affirmed.

Federal regulations concerning hunting and fishing on federal lands in Alaska, effective July 1, 1990 (under

regulations promulgated July 1, 1990) contain prohibitions against hunting and fishing by "urban" classified residents, which have and will deny Plaintiffs the right to hunt and fish on federal lands and waters in Alaska in the future.

Plaintiffs maintain that such statues and regulations restricting the right of urban residents to hunt and fish on federal public land and State sovereign waters in Alaska are unconstitutional as applied and are in violation of their rights as citizens of the United States and as residents of Alaska.

Defendants are: (1) the United States; (2) Dirk Kempthorn (successor to Gail Norton), in his official capacity as Secretary of the Department of Interior, who maintains the principal responsibility for the enactment and application of the rules and regulations referenced above. (3) Mike Johanns, in his official capacity as Secretary Department of Agriculture, (4) Kathleen Clarke, in her official capacity as Director Bureau of Land Management; (5) Dale Bosworth, in his official capacity as Chief of U.S. Forest Service; (6) Thomas H. Boyd, in his official capacity as Representative of the Federal Subsistence Board, Office of Subsistence Management, U.S. Fish and Wildlife Services; (7) Steve Kessler, in his official capacity as Regional Subsistence Program Leader, U.S. Forest Service, Alaska Region, United States of America.

REASONS FOR GRANTING THE PETITION

1. Neither the federal government nor the state governments can claim supremacy to avoid the Public Trust Principle. However, the United States District Courts and the United States Circuit Courts of Appeals appear to be completely confused on the application of the "Public Trust

Doctrine" and the enforcement thereof by states. The District Court for Alaska appears to hold that no citizens can invoke the Doctrine while other United States District Courts invoke the "Public Trust Doctrine" to determine wildlife issues and coastal zone management issues as well as ownership interests in tidelands, etc.

The management of fish and game is traditionally left to the states under their sovereign police powers. The incursions by the federal government are strictly limited in this area. The expansion of such federal power over fish and game under ANILCA, which applies solely to Alaska, completely affects all U.S. Courts in the interpretation of the law under our system of dual sovereignty. If it does not apply the court should say so. If it does apply, the court should say so. More than 80% of the states have adopted and applied the Public Trust Doctrine. *See,* Coastal States Organization, Inc., *Putting the Public Trust Doctrine to Work* (2nd Ed) p. 278-280 (1997).

2. The equal protection clause of the U.S. Constitution guarantees equal treatment under the law. The location of one's residence should not dictate the benefit a citizen receives or what he is entitled to. The court should make it clear that the exclusions of one group of citizens to give advantage to another is improper.

I. THE PUBLIC TRUST DOCTRINE PROHIBITS THE REGULATIONS HEREIN.

The Public Trust Doctrine has its inception in early English common law with origins from Roman, Greek, French, German and English law. *See* Blackstone Commentaries 1, 12, 14-15, 2 Kent, Commentaries 348-349.

The history of common ownership of fish and game is discussed in *Geer v. Connecticut*, 161 U.S. 519, 522, 40 L.Ed. 793, 794 (1896)

> . . . While the fundamental principles upon which the common property in game rest have undergone no change, the development of free institutions had led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 16 pet. at 410, represents its people, and the ownership is that of the people in their united sovereignty. . . .

Id. at 524.

In *Shively v. Bowlby*, 152 U.S. 1, 19-26 (1894) the United States Supreme Court described the Public Trust Doctrine in the 13 original states its application to the people therein. Each state determined the extent of the doctrine but all had to honor the fundamental basics of navigation, commerce and fishing without government interference.

While the holding of the case was reversed in *Hughes v. Oklahoma*, 441 U.S. 322 (1979), the Public Trust Doctrine was not repudiated by the Court. The Court stated that the general rule adopted in the case "makes ample allowance for preserving, in ways not inconsistent with the Commerce

Clause, the legitimate state concerns for conservation and protection of wild animals underlying the 19th century legal fiction of state ownership." *Id.* at 335-36, 60 L.Ed.2d at 261.

As one U.S District Court noted in a post-*Hughes* case:

> Under the public trust doctrine, the State of Virginia and the United States have the right and the duty to protect and preserve the public's interest in natural wildlife resources. Such right does not derive from ownership of the resources but from a duty owing to the people.

In Re Steuart Transportation Co., 495 F.Supp. 38, 40 (E.D. Va 1980)

The Supreme Court had recognized the doctrine in an early case in 1855, after the State of Maryland seized a federally licensed vessel for violating a state law intended to prevent destruction of the oyster population in state waters. *Smith v. Maryland*, 59 U.S. 71 (1855). Considering whether the statute was repugnant to the federal government's overriding constitutional authorities, the Court connected the law's validity to the State's title to the submerged land. The soil below low-water mark "is held by the State, not only subject to, but in some sense in trust for, the enjoyment of certain public rights, among which is the common liberty of taking fish, as well as shellfish as floating fish * * *." *Id.* at 74-75. "The State holds propriety of this soil for the conservation of the public rights of fishery thereon, and may regulate the modes of that enjoyment so as to prevent the destruction of the fishery * * *." *Id.* Authority over fisheries derives from the title that States obtain under the equal footing doctrine: "[t]his power results from the ownership

of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held." *Id.*

Sovereign ownership of submerged lands is based on the belief that the public interest in fishing, navigation, and commerce is greater than the sum of private interests, and that, as local sovereign, the state is responsible for protecting that interest. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them * * * than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Co. v. State of Illinois*, 146 U.S. 387, 453 (1892). Congress reaffirmed these principles in the Submerged Lands Act, providing that States have "the right and power to manage * * * natural resources" along navigable waters, including "fish." 43 U.S.C. §§ 1311, 1301(e).

Fisheries management is a traditional state authority through which a "State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). According to the Supreme Court, "the state * * * has power to control the game and fish within its borders * * * in its sovereign capacity as representative of the people." *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 11 (1928). States have "important interests in regulating wildlife and natural resources within their borders," *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999). The Court recognizes "the importance to its people that a State have power to preserve and regulate the exploitation of an importance resource." *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 284 (1977). It considers "the States' interest in conservation and protection of wild animals as legitimate local purposes

similar to the States' interest in protecting the health and safety of their citizens." *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979).

Indeed, control over the fisheries resource was one of the reasons Alaskans wished to form a State. Alaskans wanted the "pitifully depleted" salmon stocks, *Metlakatla Indian Community v. Egan*, 362 P.2d 901, 915 (1961), *vacated on other grounds*, 369 U.S. 45 (1962), *aff'd sub nom. Organized Village of Kake v. Egan*, 369 U.S. 60 (1962), to be managed locally, to repair the "evils of overexploitation" of the salmon by "'Stateside' colonialism." *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 47 (1962).

During territorial days when Alaska's fisheries were regulated by the federal government, Alaskans became alarmed by the devastating efficiency of fish traps owned by politically powerful outside commercial fishing interests. *See* Gerald E. Bowkett, *Reaching for a Star: the Final Campaign for Alaska Statehood* 12-13 (1989). In 1913, the first session of the Alaska Territorial Legislature asked Congress for legislation to limit the fishing efficiency of the trap, and continued to do so regularly thereafter. *Metlakatla*, 362 P.2d at 905. Alaskans also voted overwhelmingly to abolish fish traps in a referendum in 1948. *Id.* As a territory, Alaska had no power to stop the traps' devastation. But in 1956, without a statehood act, Alaskans drafted a constitution. With the hope that they might soon be a State in control of preservation, Alaskan voters approved the proposed constitution along with an ordinance to abolish commercial traps, which the first State legislature converted to a statute immediately after statehood. *Id.*

Reflecting the deep-seated desire of Alaskans to control their own resources, the Alaska Constitution included a number of provisions relating to state management of fisheries and waters. "In adopting their constitution, the people of Alaska have very clearly constituted the state as owner of the natural resources * * *." *Greisen v. United States,* 831 F.2d 916, 918 (9th Cir. 1987). For example, the Alaska Constitution provides that "[w]herever occurring in their natural state, fish, wildlife, and waters are reserved to the people for common use." Alaska Const. art. VIII, § 3. This provision "constitutionalize[s] historic common law principles governing the sovereign's authority over management of fish, wildlife, and water resources of the state for the benefit of all the people." *Id.*

The Alaska Constitution also requires the State to regulate the harvest responsibly. "Fish * * * and all other replenishable resources belonging to the State shall be utilized, developed, and maintained on the sustained yield principle, subject to preferences among beneficial uses." Alaska Const. Art. VIII § 4. The "migrating schools of fish, while in inland waters, are the property of the state, held in trust for the benefit of all the people of the state, and the obligation and authority to equitably and wisely regulate the harvest is that of the state." *Metlakatla,* 362 P.2d at 915; *see also* Alaska Const. art. 8, § 2 ("The legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters for the maximum benefit of its people.")

The regulations of the Federal Subsistence Board simply exclude a substantial portion of the citizens of Alaska and all other citizens of the United States outside Alaska from consideration for use of all fish and game on public lands

which is held in trust for all citizens of Alaska and the United States.

The Ninth Circuit Court of Appeals Opinion incorrectly states that the Appellants had conceded the legal issue of Public Trust. (Appendix A) The United States District Court for Alaska specifically ruled that Appellants could not assert the Public Trust Doctrine in a decision for partial summary judgment on the motion to accept the amended complaint on March 4, 2004. (*See* Appendix C, pages 8 and 9); and the issue was argued to the Ninth Circuit Court of Appeals.

II. THE REGULATIONS RESTRICTING USERS ON FEDERAL LAND VIOLATE EQUAL PROTECTION OF THE LAWS OF ALASKA AND UNITED STATES CITIZENS.

The Ninth Circuit affirmed the decision of the United States District Court for the District of Alaska that the regulations of the Federal Subsistence Board established pursuant to ANILCA, (which applies solely to Alaska) were properly adopted even through these regulations exclude all urban residents of Alaska from subsistence hunting and fishing on all federal land in Alaska. The Board found that in order to establish a rural preference on federal lands in Alaska for subsistence hunting and fishing in Alaska that all urban residents had to be excluded from subsistence hunting or fishing on federal lands in Alaska.

The diagram at Appendix D of federal land in Alaska shows the definition of "rural" and "urban" to be illusory as a classification of users. (*See*, Appendix D – Map. Alaska's National Parks, Monuments and Preserves, Norris "Alaska Subsistence (National Park Service, 2004).

The Fifth Amendment of the United States Constitution and the Fourteenth Amendment of the United States Constitution provide for due process of law and equal protection of the law to all citizens of the United States. Here the yearly regulation denying all urban residents of Alaska and all non-Alaska citizens the right to subsistence hunt or fish on federal public land in Alaska violates those equal protection principles.

Fish and wildlife may be managed for designated preferences among *uses*, but equal protection mandates an equality among the *users*. Federal public lands are reserved for specific purposes (uses). For example, the Kenai National Wildlife Refuge's primary purposes are managed for fish, wildlife and recreation (uses), but these resources must be available for taking on the basis of equal consideration among all people using those resources (users). Public land ownership, whether state or federal, sets up the purposes (or uses) for which those lands are reserved. After beneficial uses are selected, the state then utilizes its police powers to regulate the users, or the beneficiaries, of the common public trust property (fish, wildlife and water resources) on both federal and state land.

Kleppe v. State of New Mexico, 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976), is often cited by proponents of federal management over what was traditionally managed under state police power. However, this decision, in fact, recognizes the Secretary of the Interior's responsibility to decide preferences among resource uses that are compatible with the purpose for which they were reserved. The decision neither implicitly nor explicitly attempts to establish a preference of users for those uses. No effort was made by

the Supreme Court to designate any preference of users for the identified uses whatsoever.

If one looks to ANILCA for a clear understanding of the term rural residency, the nearest attempt at a definition is the phrase "customary and traditional." Unfortunately, the terms within that phrase, *i.e.*, "custom" and "traditions" have been defined either broadly or narrowly depending upon the various perspectives of the courts which have done so. The court's struggle with this ambiguous phrase is reflected in the Alaska Supreme Court's statement: "Despite repeated legal challenges to and multiple revisions of the subsistence laws, 'subsistence uses' have long been defined in terms of 'customary and traditional uses'; accordingly, we consistently have interpreted[2] customary and traditional to refer to *'uses'* rather than *'users'*."

Again, the section in ANILCA following the rural preference section, Section 804, clearly signals that a survey of wildlife is constantly to take place and yearly reports are to be made to gauge the quantity of game and to arrange subsistence activity based on the total resource. No one argues that the entire stock of game on federal land cannot be used for "subsistence" – that is regulation of use. However, the exclusion of all urban hunters of Alaska or non-Alaskan U.S. citizen hunters has nothing to do with subsistence use or the evaluation of the game stocks, it is an impermissible regulations of users. (16 U.S.C. § 3115)

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2. *Payton v. Alaska*, 938 P.2d 1036, 1042 (Alaska 1997). (The Supreme Court did not remand this case to the Superior Court, but instead ordered the Board of Fisheries to grant the Paytons their right to participate as equal users in the subsistence fisheries.)

The 9th Circuit erred when it ruled that the regulations excluding "urban" hunters were rationally related to a rural preference. This is particularly true where the "rural" designation in Alaska is based on the local government units which are in close proximity to the excluded "urban" area.

III. THE CONSTITUTIONAL POWER OF REGULATION OF FEDERAL LAND DOES NOT RESTRICT THE RIGHTS OF CITIZENS.

When Congress manages federal property, its authority comes from the Property Clause to the U.S. Constitution.[3] The federal government claims in this action that because the property clause gives Congress the power to make "needful rules" and "regulations" respecting federal lands, then (a) *any* action taken by Congress by virtue of that Clause with respect to federal lands is valid, (b) Congress has unlimited power over the administration of public lands, and (c) normal constitutional constraints are not effective against such rules. Hence, they claim, Congress can, by virtue of the property clause, grant the Secretary of the Department of the Interior the power to *regulate* wildlife harvest on federal public lands in Alaska and to *regulate* fish harvest in certain (if not all) of Alaska's navigable waters simply by passing an act authorizing those actions.

A similar argument was presented to the U.S. Supreme Court in *Kansas v. Colorado*, 206 U.S. 46, 27 S.Ct. 655, 51 L.Ed 956 (1907), but held untenable. The Court held that

3. U.S. Constitution, Art. IV, §3 "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular state."

the Tenth Amendment constrains Congress, even when Congress acts under the property clause. *Id.* 206 U.S. at 90. Furthermore, Congress cannot act outside the enumerated powers granted by Article I, Section 8 of the United States Constitution. Therefore, since fish and wildlife are not federal property[4] and the navigable waters are not federal property, the property clause does not authorize this type of management of Alaska's fisheries or wild game.

The property clause very clearly bans any action prejudicing the rights or claims of any individual state. The Tenth Amendment clearly reserves to the people those powers not granted to Congress. It is settled law that, when it comes to internal affairs, the states retained their police power.[5]

Management and regulation of fish and wild game is a universally recognized police power belonging to the states. The "rural" allocation scheme now implemented by the federal government utilizing ANILCA violates Alaska's broad trustee powers and police powers over its wild animals on federal lands within state boundaries. The State of Alaska, not the federal government, has trust title to and regulates the harvest of wild animals on federal lands within its boundaries.

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4. The rule of law which all American courts have recognized is that wild game are owned, to the fullest extent that any wild animal may be owned, by the states in their sovereign capacity as the representatives and for the benefit of all their people in common. *See, United States v. Shauver,* 214 F. 154 (E.D. Ark. 1914); *State v. Hume,* 52 Or. 1, 5, 95 Pac. 808, 810 (1908).

5. *Kleppe v. New Mexico,* 426 U.S. 529, 96 S.Ct. 2285, 49 L.Ed.2d 34 (1976).

ANILCA was adopted for Alaska "in recognition of the unique conditions in Alaska." 16 U.S.C. § 3203. 16 U.S.C. § 3202 specifically provides that "Nothing in this Act is intended to enlarge or diminish the responsibility and authority of the State of Alaska for management of fish and wildlife on the public lands. . ."

Thus whether or not the property clause is being properly followed by the United States herein, it does not provide a legal basis to exclude Plaintiffs from subsistence hunting and fishing on federal lands in Alaska.

The United States Constitution does not make a general grant of legislative power, it reads: "Article 1, § 1. All legislative powers herein granted shall be vested in a Congress. . ." And then, in Article VIII, § 1 it mentions and defines the legislative powers that are granted. Because there is no general grant of legislative power it has become an accepted constitutional rule that the federal government is a government of enumerated (not unlimited) powers.[6] Therefore, Congress claims a legislative power, even when it applies to public lands, the question is whether or not that power is one of those granted by the Constitution. The allocation of Alaska's fish and wildlife to a special class based on location of their residence is *not* one of the powers granted to Congress by the Constitution.

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6. *See, M'culloch v. Maryland,* 17 U.S. 316, 4 Wheat. 403, 4 L.Ed. 579, 601 (1819) ("This government is acknowledged by all to be one of enumerated powers. The principle that it can exercise only the powers granted to it seems too apparent to have required to be enforced by all those arguments which its enlightened friends ... found it necessary to urge. The principle is now universally admitted").

Alaska, on an equal footing with the other states, has the power to regulate, control, or prohibit the hunting and killing of fish and wild game within its sovereign boundaries.[7] The federal government does not have any enumerated power under the U.S. Constitution to interfere in Alaska's internal affairs.[8] This local power has recently been reaffirmed by the United States Congress in May of 2005 with the passage of House Bill 1268, the "Emergency Supplemental Appropriation Action for Defense, the Global War on Terror, and Tsunami Relief, 2005", which provides as follows in Section 6063(b)(1):

> It is the policy of Congress that it is in the public interest for each State to continue to regulate the taking for any purpose of fish and wildlife within its boundaries, including by means of laws or regulations that differentiate between residents and non residents of such State with respect to the availability of licenses or permits for taking of particular species of fish or wildlife, the kind and numbers of fish and wildlife that may be taken, or the fees charged in connection with the issuance of licenses or permits for nonresidents.

House Bill 1268 § 6063(b)(1).

The rulemaking power granted to an administrative agency charged with the administration of a federal statute

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7. *See, Kleppe v. New Mexico*, 426 U.S. at 545 (1976) (No doubt it is true that as between a state and its inhabitants the state may regulate the killing . . . of [wildlife].

8. *Dandridge v. Williams*, 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491, 502 (1970); *See also, Martin v. Lessee of Waddell*, 41 U.S. 367, 16 Pet. 367, 367-369, 10 L.Ed. 997 (1842).

is not the power to make law. Rather, it is the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214 (1976).

Title VIII of ANILCA as adopted by Congress does not exclude people. Its intent is to create priorities of uses of fish and game for residents of Alaska and the United States.

The regulations herein make no attempt to protect or prioritize the existing stock of fish and/or game in excluding "urban" residents. This clearly exceeds the statute granting the right to adopt regulations to carry out the purpose of ANILCA.

CONCLUSION

For all the foregoing reasons, petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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